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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 624

CLYDE A. PERKINS, *Petitioner*,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

Petitioner Clyde A. Perkins was awarded $336,404.57 in actual damages by a jury which found that respondent Standard Oil Company of California had unlawfully injured Perkins, in violation of Section 2 of the

Clayton Act, 15 U.S.C. § 13, by, *inter alia,* selling gasoline to his competitors at discriminatorily lower prices. The district court trebled the award and allowed Perkins $289,000 in attorney's fees, for a total judgment against Standard of $1,298,213.71. The Ninth Circuit set aside the jury verdict and remanded the case for a new trial.

In our main brief we argue for reversal of the court of appeals' judgment and reinstatement of the jury award and the district court's judgment. Standard contends that the Ninth Circuit should be affirmed and suggests, as an alternative, that the case be remanded to that court for further proceedings (see R. Br. 45, 54).[1] The overriding theme of Standard's brief, stripped of invective, is that there was no evidence to support the jury verdict. The overriding error in Standard's approach is its complete ignoring of the fact that "[t]here was . . . sufficient evidence to go to the jury and it is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts' . . . ." See *Continental Ore Co.* v. *Union Carbide & Carbon Co.,* 370 U.S. 690, 700-01 (1962).

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[1] "R. Br. —" refers to the Brief for Respondent filed with this Court; and "P. Br. —" refers to the Brief for Petitioner. Respondent has lodged with this Court its Specification of Errors in the Ninth Circuit and all documents filed by Perkins in that court. We have lodged with the Court the following documents filed by Standard in the Ninth Circuit: Appellant's Opening Brief, Appendix I to Appellant's Opening Brief, Appellant's Reply Brief, and Response of Appellant to Petition for Rehearing and Motion for Clarification. The number of this case in the Ninth Circuit was 19,436.

I.

INTRODUCTION—THERE IS NO DISPUTE AS TO THE ESSENTIAL FACTS RELIED UPON BY PETITIONER IN ESTABLISHING STANDARD'S VIOLATION OF THE ORIGINAL SECTION 2 OF THE CLAYTON ACT.

Petitioner's major contention is that the jury properly could have concluded that the effect of Standard's price discriminations against him (and in favor of Signal Oil & Gas Company) tended substantially to lessen competition in the Pacific Northwest wholesale and retail gasoline market (P. Br. 36-58). That contention is premised upon the following facts—none of which are, or could be, disputed in Standard's brief.

Standard sold gasoline to Perkins at higher prices than it charged Signal for gasoline of like grade and quality (P. Br. 13 and fn. 16). Signal resold that gasoline to Western Hyway Oil Company, its subsidiary, which, in turn, resold the gasoline to its subsidiary, Regal Stations Co. (*id.*, at 9). Regal, which operated retail stations in Portland, competed with stations owned and supplied by Perkins (*id.*, at 10).

In a short summary of the record evidence, the Ninth Circuit stated that Regal entered the Portland market "with a scale of prices well below that of other retailers and persisted in undercutting other retailers;" that the record contains "substantial evidence" that Regal's pricing policy started a deep and long sustained price war; and that the record contains "proof tending to show"—

> "that the impact of Regal's price policy went far beyond Portland; that it precipitated and sustained a sort of chain-reaction throughout Perkins' entire marketing area, and that it adversely affected both the wholesale and retail business car-

ried on by Perkins." [A. 108-09 fn. 6; see P. Br. 16-17.]

During the price wars occurring throughout the claim period (March 1955-December 1957), Standard granted price subsidies to its Branded Dealers, who were retailers,[2] but declined to provide comparable assistance to Perkins (P. Br. 18; see Ex. 1523 A-CC, A. 605-30).

Standard was the price leader and principal gasoline supplier in the Pacific Northwest during the claim period (P. Br. 7); and Perkins was bound by contract to purchase the vast bulk, if not all, of his gasoline requirements from Standard (*id.*, at 46). From mid-1955 until he went out of business in December 1957, Perkins repeatedly notified Standard of the deteriorating price structure in his marketing area and requested price assistance (P. Br. 18-20). Standard repeatedly denied Perkins' requests for assistance (except for one small payment, *id.*, at 15 fn. 18) until Perkins went out of business (*id.*, at 18-19). And it did so despite the asserted belief of a high Standard official that Regal, because of its " 'better price,' " would " 'wreck' " the Pacific Northwest gasoline market (*id.*, at 19 fn. 19).

Prior to going out of business in 1957, Perkins was one of the largest independent gasoline marketers in the Pacific Northwest, having a 2.4% market share (P. Br. 48). During the entire claim period the majors

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[2] See A. 300 where Standard's counsel argued to the district court, in support of a successful motion to strike certain testimony, that Standard had "stated at the outset that a price assistance program was extended [to the Chevron Dealers]."

dominated that market, and the position of the independents had been declining (*ibid.*). When Perkins ceased operating he leased his business to a major, Union Oil Company of California, accelerating the independents' decline (P. Br. 7, 48).

At trial, Perkins' expert witness testified, in response to a hypothetical question covering the salient record evidence, that the foreseeable market trend was "toward increased concentration," "a continued decline of small business," and "higher [gasoline] prices" (A. 359-60; see P. Br. 49). In addition, the same witness observed that a long-sustained policy of discriminatory pricing can persist "only under conditions of some degree of monopoly power" (A. 353; P. Br. 50).

The above summary consists of the essential facts on which Perkins bases his contention that the jury properly could have found that Standard's price discriminations in favor of Signal not only injured Perkins in his competition with Signal, but also substantially lessened competition in the wholesale and retail marketing of gasoline in the Pacific Northwest, in violation of Section 2(a) of the Clayton Act, 15 U.S.C. § 13(a). Standard's failure to controvert these critical facts—considered in light of Standard's innumerable (albeit erroneous) accusations of factual misstatements in petitioner's main brief—makes clear that there is no significant dispute about the record evidence which this Court need resolve in order to reach the important legal questions raised by petitioner.

II.

THE RECORD CONTAINS SUBSTANTIAL EVIDENCE THAT STANDARD'S DISCRIMINATIONS AGAINST PERKINS PROXIMATELY CAUSED COMPETITIVE INJURY TO PERKINS AND A SUBSTANTIAL LESSENING OF COMPETITION IN THE RELEVANT LINE OF COMMERCE.

All that is necessary to move from the undisputed facts discussed above to affirmance of the jury verdict and the district court's judgment is evidence of a causal connection between Standard's discriminatorily lower prices to Signal and the competitive injury to Perkins in particular and the Pacific Northwest gasoline market in general. The issue is whether "the record discloses *sufficient evidence for the jury to infer the necessary causal connection* between respondent's antitrust violations and petitioner's injury." *Continental Ore Co., supra,* 370 U.S., at 700 (emphasis added); see, *e.g., Sanitary Milk Producers* v. *Bergjans Farm Dairy, Inc.,* 368 F.2d 679, 689 (8th Cir. 1966). The record below contains more than enough proof to meet that requirement.

Standard's argument on this issue, repeated throughout its brief, is that there is no evidence that Standard's discriminatory price advantages to Signal were passed on to Regal, and therefore they could not have caused any competitive harm.[3] Respondent begins this argument by claiming that the district judge failed to give an important instruction proferred by it at A. 96-97; and that it objected to this alleged error at A. 458 (R. Br. 5). While Standard did make the claimed objec-

[3] See R. Br. 4, 6, 9 fn. 6, 14 fn. 12, 20, 26-30, 33-34, 36-37 and fn. 38, 41, 48, 51.

tion, the district judge's charge in fact covered the pertinent instruction proposed by Standard at A. 96-97.

Respondent's Instruction No. 86 contains the following relevant sentence (A. 96-97):

> "Unless plaintiff has shown by a preponderance of the evidence that a price advantage was given to Signal Oil and Gas Company by Standard, and that *this price advantage proximately caused, or substantially contributed to,* the adoption by Regal of those marketing methods which are claimed to have injured the business of Perkins . . ., plaintiff cannot recover for any such alleged injury." [Emphasis added.]

The charge given by the district judge on this point was as follows (A. 72-73):

> "Members of the jury, under this burden of proof, the plaintiff must show by a preponderance of all of the evidence in the case that the claimed injury and resulting damage to the property and the business interest of himself, Perkins of Oregon and Perkins of Washington respectively, and the amount of such damage was *approximately* [*sic*] *caused* by some act or omission of discrimination on the part of the defendant Standard in violation of the act in any one or more of the particulars claimed by the plaintiff. In this connection, *by way of a definition of the phrase 'proximate cause', you are instructed that an injury or damage to a plaintiff is proximately caused by an act or an omission on the part of the defendant whenever it appears that the act or omission played a substantial part in actually bringing about or causing the injury or damage* and it further appears that the injury or damage was either a direct result or a reasonable, probably sequence of the act or omission." [Emphasis added.]

The court's instructions fairly presented the causation question to the jury, and no further elaboration was required. The record contains substantial evidence that Standard's discriminatory price advantages to Signal proximately caused or substantially contributed to the competitive injury wrought by Regal throughout the Pacific Northwest during the period from September 1956 through December 1957.

First, it is undisputed that Perkins paid Standard a higher price than Signal during the entire year 1957 (R. Br. 21 fn. 22),[4] and there was substantial evidence from which the jury could have concluded that Signal also paid a lower price than Perkins from the time of Signal's first liftings at Willbridge in Portland (in September 1956) through December 1956. While Signal's invoice prices may have been higher than Perkins' during the latter three months, in January 1957 Signal received a retroactive price adjustment of $394,735 (Ex. 1550-B, A. 631; A. 441); the amount of that adjustment was directly based upon the gallonage delivered to Signal by Standard during a period including those three months (Ex. 1550C-1, A. 633); and the record contains evidence that Signal was aware during those three months that it would receive such an adjustment.

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[4] The trial judge was clearly correct in denying Standard's request that he charge the jury that a question of fact existed as to whether Standard had given Signal "a price advantage" (A. 97). As the judge instructed the jury, Standard's admission of its lower price to Signal had taken that issue out of the case: "It now appears that the evidence in this case is undisputed and that defendant Standard admits that Standard offered a lower price on both ethyl and regular gasoline to Signal Oil and Gas Company after December 31, 1956 than it did to plaintiff Clyde Perkins. Therefore, the plaintiff has proven that there has been price discrimination" (A. 63).

The Standard-Signal negotiations for a price adjustment to the favored purchaser, which culminated in the January 1957 retroactive adjustment, began in early 1955 at the behest of Signal, which was "demanding a lower price in gasoline" (A. 422). Those negotiations continued throughout 1955 and 1956 (A. 422-32). It became apparent to Standard officials during 1956 "that we would have to make some [price] concession if we wished to write a new contract and preserve that crude oil supply for us" (A. 433; see P. Br. 8-9). In the spring of 1956 Signal was made aware that only the amount of the price discount was in issue—with Standard being "unwilling to go *as low as* . . ." Signal wanted—and that the Standard negotiator was "working on something that hadn't been approved by [his] people yet" (Tr. 5480, 5481, emphasis added).

While Signal was officially informed in January 1957 (by Mr. Godfrey of Standard) of respondent's decision —sometime after Standard had "approved making an adjustment" (A. 433)—the jury reasonably could have believed that Signal, like Standard, recognized earlier the inevitability of the adjustment ultimately approved, in view of Standard's communicated position in the spring of 1956 and its continued dependence on Signal's crude oil supply. This is particularly true since Mr. Godfrey, the Standard executive who officially notified Signal of the adjustment, obviously was not the only Standard official discussing this matter with Signal. Thus, while Mr. Godfrey believed (and told Signal) that Standard was "not obligated in any way to carry on with a similar adjustment in the future" (A. 434), unbeknown to him at the time, he "was a little wrong in that" (A. 434). His superiors at Standard had independently assured Signal "that the adjustment

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will continue until they [Signal] are informed by Standard that it has been terminated" (see Ex. 1550 B-1, A. 632; A. 435).[5]

Tracing the causation chain farther, not only was Standard's price to Signal lower than Standard's price to Perkins, but the Regal retail outlets (serviced through Signal) sold gasoline at lower prices than the retail outlets supplied by Perkins. The price of gasoline, in short, was lower at both ends of the Signal distribution chain—going in at wholesale and coming out at retail.[6]

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[5] The record evidence discussed in the text demonstrates the fallacy in Standard's repeated, carefully worded statements that proof of causation failed because "[w]hen Regal opened in Portland in September 1956, Perkins was buying gasoline from Standard for his market in Vancouver at a *lower* price than Signal was paying," and "the lower price to Signal . . . did not start until January 1957, four months after Regal had opened its first station and precipitated the price war . . ." (R. Br. 21, 28, emphasis in original).

[6] Standard argues that the causation link broke because the price differential against Perkins was less at the wholesale level than at retail (*e.g.*, R. Br. 28). That argument is without merit. It was not necessary for the jury to trace the gasoline prices at all points in the Signal distribution chain in order to resolve the causation question in favor of Perkins, particularly in view of the family relationship existing among all entities in that chain of distribution (see P. Br. 54, 63-66). Beyond this, it has long been settled that a price discrimination is unlawful if it substantially contributes to the resulting competitive injury, even if it is not the sole causative factor, as the district court charged the jury (A. 72-73). Mr. Justice White summarized the law on this point in his concurring opinion in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 143-44 (1968), as follows:

> "Normally, it would be enough with respect to causation if the defendant 'materially contributed' to plaintiff's injury, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370

Regal's lower prices at the retail level "precipitated and sustained" price wars throughout the Pacific Northwest, as the Ninth Circuit acknowledged (A. 109 fn. 6). And, during those wars, Standard provided price assistance to its Branded Dealers located throughout the market, enabling them to lower their retail prices (Ex. 1523 A-CC, A. 605-30). Since Standard was the price leader in the market (Tr. 4940, 4945-46, 5628, 5630), other retailers then dropped their prices in response. As a Shell dealer in Portland testified, "it was Signal Oil [Branded Dealer] that we watched when we had two below us" (Tr. 503).

When Signal and the Branded Dealers thus depressed retail prices, Perkins, who was not receiving price assistance from Standard, was forced either to drop his prices and lower his profit margin or hold his prices somewhat firm and lose his customers—and the evidence established that both alternatives occurred. As Mr. Perkins testified (A. 155)—

> "the two largest factors that we had in the decline of my purchases from the Standard Oil was the discontinuance of my deliveries to certain accounts. That was one of the big declines. And then the

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U. S. 690, 702 (1962); or 'substantially contributed, notwithstanding other factors contributed also,' *Momand* v. *Universal Film Exchanges, Inc.*, 172 F.2d 37, 43 (C.A. 1st Cir. 1948), *cert. denied*, 336 U. S. 967 (1949). The plaintiff need not show that the illegality was a more substantial cause than any other. *Haverhill Gazette Co.* v. *Union Leader Corp.*, 333 F.2d 798, 805-806 (C.A. 1st Cir.), *cert. denied*, 379 U. S. 931 (1964)."

Standard's reliance on rhetorical questions in its argument against causation (see R. Br. 33) is convincing proof of the lack of record evidence that any factors other than Standard's price discriminations against Perkins substantially contributed to his destruction.

other, and the thing that was—finally finished us up was the—the depressed market—retail market. . . ."

The depressed market "finished" Perkins because prices plummeted so sharply that the major-minor differential of 2¢ could not always be maintained by the minors and, as a result, their "volume shrunk" (see Tr. 977, testimony of Mr. Logan about Westway Oil Company). As Mr. Perkins testified (A. 311)—

> "when the price wars came on or the depressed market, we were unable to stay two cents below [the Branded Dealers]. Many times we had to even sell at the same price they were, and sometimes at a higher price."

Standard's price discriminations in favor of Signal and its price assistance to the Branded Dealers persisted throughout the claim period. And during that period Perkins' business, which previously had been growing (A. 146), declined sharply, while Signal, by contrast, substantially increased its purchases from Standard (Ex. 23H, A. 523).[7] While Perkins did not,

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[7] Standard asserts, with no citations to the record, that Perkins' business had been declining prior to the claim period (R. Br. 17 fn. 17), referring to a chart printed in the Brief of Appellee (p. 45) in the Ninth Circuit. Perkins, however, had explained to the court of appeals that the pre-1955 data on that chart had not been shown to the jury (*id.*, at 43 fn. 35). Ex. 93B, A. 542, was substituted therefor because pre-1955 data had been kept out of evidence by order of the district court upon objection of Standard (Tr. 2407-08).

The trial judge did permit Perkins to testify that his purchases from Standard declined after 1954 because he lost the Truax Oil Company account—"the largest account that I had which included one-third of my business through the Standard Oil" (A. 152). The jury was not advised that Perkins lost the Truax account to Standard in 1954, when respondent began to serve Truax directly—an action for which Perkins filed a suit for breach of contract. *Perkins* v. *Standard Oil Co.*, 235 Ore. 7, 383 P. 2d 107, 110, *mot. for modification denied*, 383 P. 2d 1002 (1963).

and obviously could not, explain which competitors gained each gallon of gasoline sales he lost, the record does contain specific evidence as to some of Perkins' lost business (A. 241, 249, 253, 254, 260; Tr. 590, 795-97) and general evidence that the motoring public purchased gasoline during periods of depressed prices at those stations offering the greatest savings (Tr. 709; A. 255).

The jury surely could have inferred from all this evidence what would appear to be obvious, that Perkins' decline in gallonage and Signal's gain had a direct relationship one to the other—with each being caused by Standard's discriminatory pricing policy. See *FTC v. Morton Salt Co.,* 334 U.S. 37, 46-47 (1948); *Lessig v. Tidewater Oil Co.,* 327 F. 2d 459, 471 (9th Cir. 1964), *cert. denied,* 377 U.S. 993 (1964). This inference is strengthened by the fact that Regal, which precipitated the price war, was the sole retailer of Signal's gasoline in the Portland area (R. Br. 11), and Perkins' marketing expert testified that the major impact on the market was caused by Regal's new concept of advertising its low prices on large signs (A. 275-76).[8] He further testified that the Regal-caused price disturbances probably would have cleared up had price assistance to other retail dealers been stopped (A. 277).

The substantiality of Perkins' evidence of causation is enhanced by two additional evidentiary items. First,

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[8] Standard, in discussing this witness' testimony, acknowledges his emphasis on "advertising," but makes a distinction between advertising in general and "gasoline prices" (R. Br. 34 fn. 33). The question to which the witness gave the answer summarized in the text, however, plainly combines the two items, relating to "this new concept of *advertising prices*" (A. 276, emphasis added).

during the Standard-Signal negotiations which resulted in the retroactive price adjustment (see *supra*, pp. 9-10), Mr. March (Signal's Vice-President of Marketing, A. 415) took the "position" that—

> "unless he had a lower price from the Standard Oil Company, *he could not give his customers a lower price.*" [A. 432, emphasis added.]

Secondly, "in the fall, late fall of '56" (A. 188)—after Regal had opened its first station in Portland "in September 1956" (R. Br. 12)—two Standard executives acknowledged that Regal had " 'a better price' " than Perkins in the Pacific Northwest, and they predicted that, as a result, Regal would " 'wreck that market' " as it had done other places (A. 189; see A. 201).[9]

Surely the jury could fairly infer the existence of a causal connection which Standard officials themselves foresaw and predicted on the basis of considerably less evidence. The jury, in sum, reasonably could have concluded, in light of all the evidence, that Standard's discriminatory price advantages to Signal and its price assistance to the Branded Dealers proximately caused and sustained the Regal price wars—resulting in Perkins' demise and the concomitant lessening of competition in the Pacific Northwest gasoline market—especially since a key Signal marketing official wanted lower prices

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[9] Standard argues that because some words in the conversation described above (and in more detail at P. Br. 19 fn. 19) are in the future tense, the conversation "obviously took place before Regal entered the market in the Northwest with gasoline purchased from Western . . ." (R. Br. 27 fn. 25). The time periods quoted in the text, however, refute that argument, and Standard cites no evidence in support thereof.

precisely so he could "give his customers a lower price" (A. 432).[10]

Finally, Standard's repeated belittling of Signal's price advantages (see, *e.g.*, R. Br. 5, 10 fn. 7, 21, 28) deserves brief response. Perkins' gross profit per gallon of gasoline during the claim period was 1.54 cents (Tr. 3653-54). There was evidence at trial that no jobber could survive with a gross margin below 2 cents (A. 364-65; Tr. 1001; see Tr. 3656-58). Had Perkins been paying the same price as Signal his gross profit would have risen to about 2.2 cents per gallon (see Ex. 82C, 82D, A. 529, 530), and he would at least have had a chance of survival.

III.

PETITIONER PRESERVED IN THE COURT OF APPEALS HIS CONTENTION THAT STANDARD'S DISCRIMINATIONS AGAINST HIM SUBSTANTIALLY LESSENED COMPETITION IN THE PACIFIC NORTHWEST GASOLINE MARKET.

Standard does not controvert our legal argument that its discriminations in favor of Signal are actionable under the Clayton Act's original Section 2 prohibition of price discriminations whose effect "may be substan-

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[10] In 1956, Signal offered Perkins lower prices (3/4¢ lower on regular gasoline and 8/10¢ on ethyl) than Standard (A. 185-86). Standard argues that Perkins' failure to accept that offer "would negate injury from Standard's price" (R. Br. 33 fn. 31). However, at the trial, Perkins was asked by his counsel, "why didn't you make a contract with them [Signal] at that time?" Standard's counsel objected on the ground that it "is completely irrelevant and immaterial as to why this person didn't make a contract with Signal Oil & Gas Company in 1956." (Tr. 348.) Perkins went on to explain the reason: that the Signal official later said, " 'Well, you know, Mr. Perkins we buy our gas from Standard Oil.' " The jury was instructed to disregard that statement after Standard's counsel objected to it. (Tr. 349.)

tially to lessen competition . . . in any line of commerce" (P. Br. 38-45). Nor does Standard controvert our contention that, on the facts in the record, the jury properly could have found that Standard had transgressed that prohibition (*id.*, at 46-54), except to refer to its "lack of causation" theory (see R. Br. 37) which we have refuted above. Standard's sole argument on this issue, which it also made in its brief in opposition to the petition for certiorari (p. 11), is that the court of appeals had no opportunity to decide the question (R. Br. 36). That argument is without merit.

The trial judge's charge to the jury, as well as Standard's and Perkins' requested instructions, covered the original Section 2 provision (P. Br. 37 and fn. 29). After losing before the jury, Standard made the following legal argument in the court of appeals (Appellant's Opening Brief, p. 41):

> "Under section 2(a) of the Act, a price discrimination is actionable only (15 U.S.C. 13(a)):
>
> '* * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition *with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.*'
>
> "The above language is clear and its application just as clear. Price differentials between purchasers are actionable *only* when the adverse competitive effect occurs on the level of competition with the seller (Standard), with the seller's favored customer (Signal Oil and Gas Company), or with the purchaser from the seller's favored customer (Western Hyway). A claim based on injury to competition with a customer further removed (Regal) is not actionable." [Emphasis in original.]

As the above quotation makes plain, while Standard did not highlight the original Section 2 prohibition, neither did it ignore that prohibition—as indeed it could not reasonably do, since the issue had been presented to the jury. Fairly read, Standard's position in the Ninth Circuit was that the functional level limitations of the Robinson-Patman amendments modified the "substantially to lessen competition" test of the original Section 2 as well as the "injure, destroy, or prevent competition" test of those amendments.

Perkins, responding to Standard's appeal, argued that Standard's discriminations, in addition to specifically disadvantaging him as a competitor of Signal and the Branded Dealers, also lessened competition throughout the entire Pacific Northwest market, aggravating existing tendencies toward monopolization (Brief for Appellee, *e.g.*, pp. 28-31, 38-42). As part of his argument for affirmance of the district court's judgment, Perkins pointed out that the judge had noted that the question whether the entire Pacific Northwest market had been "upset" by Standard's discriminations was a key issue for the jury to decide (Tr. 3555, quoted at Brief for Appellee, p. 63):

> "If the jury accepts some of the evidence in testimony of the plaintiff, the whole Western market from Olympia [Washington] to Roseburg [Oregon] was affected . . . . I don't know if they are going to accept it or not, but there is evidence in the case which would warrant that. Now, if they do, that is, the whole marketing area. It is a question for the jury." [Fn. omitted; see map at P. Br. 80.]

Moreover, Perkins stressed in the Ninth Circuit the same facts he relies upon in this Court. For example,

he observed below that "Standard was the acknowledged price leader in the Pacific Northwest;" that "Standard sold nearly 30% of the gasoline in the Northwest;" that "[t]he flow of products into the Northwest was controlled almost exclusively by major oil companies;" that "[t]he relative importance of independent jobbers has declined;" and that his expert economist had testified "that under price discrimination the normal trend would be towards increased concentration and acceleration of oligopolistic trends and continued decline of small business with the ultimate tendency for prices to be raised to the consumer" (Brief for Appellee, pp. 38, 39, 40, 41).

In the same vein, when petitioning for rehearing Perkins argued that this Court in the *Van Camp* decision had expressly rejected a functional level limitation on the reach of Section 2 of the original Clayton Act, focusing instead on commercial realities to determine whether competition had been lessened in any realistic market.[11] In denying rehearing, the Ninth

[11] "As originally written, 2(a) proscribed discrimination where it may 'lessen competition or tend to create a monopoly in any line of commerce.' It had no 'functional level' limitation. The Supreme Court explicitly rejected reading such limitation into § 2(a) in the only case posing that question (*Van Camp* v. *Am. Can. Co.*, 278 U.S. 245 (1929)). The Court held it applied to discrimination in both buyer and seller lines, and that:

> 'These facts bring the case within the terms of the statute, unless the words "in any line of commerce" are to be given a narrower meaning than a literal reading of them conveys. The phrase is comprehensive and means that if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words "in *any* line of commerce" literally are satisfied' (p. 253).

"The line of commerce in which Perkins and [Signal] competed was functionally similar to Van Camp." [Answer of Appellee to Response to Petition for Rehearing, p. 6.]

Circuit expressly stated that Perkins' petition "[e]ssentially . . . is *nothing more than a repetition of arguments* concerning assignments, which we are satisfied were all adequately considered and *correctly passed upon by our written opinion*" (A. 103, emphasis added). Thus, this issue was properly submitted to the jury and preserved in the court of appeals. Contrary to Standard's contention, the Ninth Circuit was not denied a fair opportunity to appraise and resolve the question. By failing to resolve it in favor of Perkins, that court erred.

IV.

THE JURY PROPERLY COULD HAVE FOUND THAT STANDARD'S DISCRIMINATORILY LOWER PRICES TO SIGNAL VIOLATED THE ROBINSON-PATMAN AMENDMENTS TO SECTION 2 OF THE CLAYTON ACT.

A. Perkins and Signal Were Competitors

"Within his territory Perkins operated as a jobber . . ." (R. Br. 16). Signal, in its operations in the Pacific Northwest, also was "a jobber, so far as gasoline is concerned" (A. 285-86). It is our position that because the Regal retail outlets, which Signal serviced through Western Hyway, competed with retail outlets serviced by Perkins (P. Br. 59), the jury could have found that Perkins and Signal were competitors at the jobber or wholesale level. As the district judge observed out of the presence of the jury (Tr. 445):

> "Well, I am satisfied that the competition is between Perkins and Signal Oil, because if their ultimate market is destroyed, their market is destroyed. They go out of business."

Standard argues that the above facts are insufficient, as a matter of law, to establish that Perkins and Signal

were in "competition" within the meaning of the Robinson-Patman Act. The short answer is that *Ingram v. Phillips Petroleum Co.*, 259 F. Supp. 176 (D.N.M. 1966), and *McCormack v. Theo. Hamm Brewing Co.*, 284 F. Supp. 158 (D. Minn. 1968), squarely hold that price discriminations between wholesalers are actionable under Section 2(a), on a secondary line theory, even though the favored and disfavored purchaser each resells to retailers before any direct competitive confrontation occurs. None of the cases cited by Standard is to the contrary (see R. Br. 38-39).[12] Furthermore, Standard misconceives the thrust of our argument in contending that if it is adopted "every non-primary-line Robinson-Patman case [will be] a secondary-line case" (see R. Br. 41). That is not true. Adoption of our argument would merely mean that some cases involving price discriminations *between wholesalers whose retailers are in direct competition* would be secondary line cases—a result plainly within the intendment of Congress and the wording of the Robinson-Patman amendments.

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[12] For example, *Davidson* v. *Kansas City Star Co.*, 202 F. Supp. 613, 618-19 (W.D. Mo. 1962), *rev'd on other grounds*, 336 F.2d 439 (8th Cir. 1964), merely holds that a price discrimination is not actionable where there is no competition or possibility of competition at any functional level. The consent decree in *Shell Oil Co.*, 54 F.T.C. 1274 (1958), which Standard mislabels as a Federal Trade Commission holding, appears to be explainable on the same basis, although the agency published no substantive opinion. While the legal issue raised here perhaps could have been presented on the facts of *E. Edelmann & Co.*, 51 F.T.C. 978 (1955), the hearing examiner's opinion, on which Standard relies *sub silentio* (*id.*, at 983-84), gives no indication that it was in fact raised.

B. Signal's Control Over the Activities of Western Hyway

Standard argues that Perkins "cites no record reference" (R. Br. 43) for one of the key facts in his argument on this point—*i.e.,* Signal's and Standard's ignoring of Western Hyway's separate corporate existence provided a reasonable basis upon which the jury could have inferred that Signal, in the circumstances pertinent here, controlled Western Hyway to the extent necessary to attribute to Signal that subsidiary's sales to Regal (P. Br. 63-66). In fact, we cited the following evidence to support that point: Ex. 1707, 1709, A. 653, 655; A. 438-439; Tr. 5526-27 (P. Br. 64)—evidence which Standard conveniently ignores. Further, in explaining a memorandum which reflected Signal's efforts to extract a yet lower price from Standard because Western Hyway assertedly had been offered a discounted price by two companies called Hancock and Norwalk, Mr. Godfrey of Standard distinguished the latter firms as "independent companies" while describing Western Hyway as "an affiliate of Signal Oil and Gas Company" (A. 423-24).[13]

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[13] In support of its contention that "Western acted quite independently of Signal," Standard argues that Western "by 1957 bought more than 50 per cent of its total volume from other suppliers . . ." (R. Br. 44 fn. 45, referring to R. Br. 11). Standard fails to point out, however, that all the gasoline Western supplied Regal during the claim period came from Signal (A. 394). Western's purchases from other suppliers occurred in California (Ex. 1711, A. 657; Ex. 1458D).

V.

THIS CASE SHOULD NOT BE REMANDED FOR FURTHER PROCEEDINGS.

Standard argues that the district court made errors in its rulings relating to (*a*) the computation of damages, (*b*) Standard's price assistance to the Branded Dealers, and (*c*) respondent's alleged Section 2(b) defense; that the court of appeals did not pass upon some of its contentions on these points; and that it therefore would be inappropriate for this Court to reinstate the verdict without first remanding the case to the court of appeals to "review this voluminous record" (R. Br. 45). That argument is without merit, and no large scale review of the record is necessary to dispose of it.

A. The Evidence of Perkins' Damages

(1) The Ninth Circuit set aside the jury verdict because an indeterminate portion of the award "necessarily" reflected harm caused Perkins by Regal—harm which the court did not consider actionable (A. 108-09). We contend that all of the Regal-caused damages would be properly includable in the verdict should the Court reverse the Ninth Circuit's legal conclusion as to Regal, and Standard does not argue to the contrary.

The only damage question the court below resolved against Perkins involved some items of evidence which the court believed affected his individual claim (treating Perkins as a "landlord"), but not the claims of his two corporations (A. 112-13). We contend that the Ninth Circuit's decision was erroneous (P. Br. 69-77), and Standard says not one word in its defense. Standard's silence in this Court is in sharp contrast to its argument in the Ninth Circuit, where the "land-

lord" point was briefed at considerable length (see Appellant's Opening Brief, pp. 66-74).

Finally, the court of appeals decided a critical damage question in favor of Perkins—that he was entitled to recover damages for the diminution in the goodwill or going concern value of his business (A. 113). At trial, evidence was introduced that, as a result of Standard's discriminations in favor of Signal alone, the going concern value of the service stations owned by Perkins decreased by $136,441, and the going concern value of the stations he leased from others decreased by $29,915 (Ex. 82J, 82L, A. 535, 536)—totalling some $20,000 less than the jury award to him individually. These figures were predicated upon a conservative formula utilized by petitioner's expert witness, Mr. McDaniel, a partner in the accounting firm of Haskin & Sells (Tr. 3586). The record evidence was that a fair formula for ascertaining going concern value could range from $1.00 to $1.50 per average monthly gallonage, both for the stations owned by and leased to Perkins (Tr. 1106-10, 1188-90).

Mr. McDaniel steered a middle course. He utilized $1.25 per monthly gallonage as to the stations owned by Clyde Perkins (Ex. 82J, A. 535) and, as to the stations leased to him, McDaniel used both $1.25 and $0.75, for two alternative computations resulting in total losses of $49,857 and $29,915, respectively (Ex. 82L, A. 536; Tr. 3714-45). When the $49,000 figure is added to the $136,000 figure in Ex. 82J, the result closely approximates the jury's total award of $185,000 to Clyde Perkins individually (see A. 101). Moreover, as pointed out above, the testimony would support use of a $1.50 factor as to the stations owned by petitioner,

permitting the jury to assess damages to their goodwill at $163,729 rather than $136,441 (Tr. 1106-10). In short, the record evidence of goodwill damages would sustain a jury award on Clyde Perkins' individual claim considerably in excess of that actually granted.

The above discussion, without more, demonstrates that the record contains substantial evidence to support the jury award and to prove that the award was reasonable. In fact, Standard does not argue that the damages awarded were unjust or unreasonably high, and the Ninth Circuit did not so find. In these circumstances affirmance of the jury verdict is required. See cases cited at P. Br. 71-72. "The rule is clear that on appeal from a judgment based upon a jury's verdict, the verdict and judgment based thereon will be sustained if there is substantial evidence in the record in support thereof. We are required to view the evidence in a manner most favorable to the prevailing party. . . ." *Richfield Oil Corp.* v. *Karseal Corp.*, 271 F.2d 709, 712 (9th Cir. 1959), *cert. denied*, 361 U.S. 961 (1960).

Standard's basic objection to Perkins' recovery for diminution in the going concern value of his business is that Perkins realized no loss because he did not sell his operations (R. Br. 52). No case holds that disposal of the diminished assets is a prerequisite to recovery for the diminution in value caused by an antitrust violator. *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963), holds only that where a plaintiff had recovered damages for lost profits and obtained an injunction against future violations, additional damages for diminution in the value of its business would, on the facts there presented, result in a double re-

covery. Compare *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555 (1931); *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.,* 269 F.2d 950 (10th Cir. 1959), *cert. denied,* 363 U.S. 843 (1960). No double recovery was possible in the instant case, however, because the judge instructed the jury that "you cannot award [Perkins] damage for loss of good will . . . and also award him damage for loss of net profits due to the loss of sale or the loss of customers because to that extent they would be implicit or making them double profits" (A. 69).

Little more need be said. Standard's remaining objections relate to Perkins' damage computation exhibits, not the underlying damage evidence (see Perkins' business records, *e.g.*, Ex. 283A). Those objections are immaterial, for the trial judge plainly charged the jury that the charts, diagrams and summaries prepared by Perkins' accountant "are not in and of themselves evidence or proof of any fact," and that "unless you find that they are true summaries of facts and figures shown by the evidence in the case, you are to disregard them entirely" (A. 77).

(2) In any event, none of Standard's objections is well taken. First, Standard complains that several of the exhibits assumed that Perkins' sales would have increased "ten per cent per year but for the alleged discriminations" (R. Br. 50). That precise assumption was explicit in Standard's contracts with Perkins. Each contract provided that Perkins must use his "best efforts" to sell a specified quantity of gasoline in his first year of operation thereunder; that the quantity requirements for the remaining years included "the immediately preceding contract year's specified

quantity for the products involved, ***plus 10%***;" and that Standard could terminate if Perkins failed to fulfill his best efforts obligation (Ex. 2, A. 494; see Ex. 102, A. 550) (emphasis added). The jury certainly could have concluded, in light of all the evidence (see Tr. 2865, 3643, 3649-50), that Standard would not have imposed this burden upon Perkins unless Standard reasonably believed that his sales were likely to increase by 10% each year.

Secondly, Standard complains that there was no evidence to support the admission of Ex. 82G-2, A. 534, and Ex. 82O, A. 539, which compute losses for the decline in value of Perkins' fuel oil business (R. Br. 51-52). The short answer is that Allen Perkins, who worked with petitioner in his business, testified that there was a "direct relationship" between gasoline and fuel oil sales (A. 370),[14] and the accuracy of that testimony was corroborated by the parallel decline of Perkins' gasoline and fuel oil sales (compare Ex. 93B, A. 542, with Ex. 93C, A. 543). The jury was not compelled to disbelieve the above evidence, as Standard suggests, merely because one service station's business ran counter to the trend (see R. Br. 52 fn. 62).

Finally, Standard complains that the "captions [of Ex. 82J and Ex. 82L] were misleading and they included business other than that done at service sta-

[14] He explained as follows (A. 370):

"The great majority of our heating oil business was sold through our gasoline distributors. In other words, they sold heating oil as well as gasoline. When they quit purchasing gasoline, why, they quit purchasing heating oils at the same time. In other words, they wouldn't quit us and buy gasoline from somebody else and continue to buy our heating oils."

tions" (R. Br. 52). The captions of those exhibits, in fact, were straightforward descriptions of their contents: "Computation of loss in value of business" (A. 535, 536). And the ensuing computations were premised solely on gasoline "gallonage" (*ibid.*).

Standard's complaints, in short, are not only without merit; they are prototypes of the kinds of complaints it is peculiarly within the province of the jury (and the district judge) to resolve. See, *e.g., North Texas Producers Ass'n* v. *Young,* 308 F.2d 235, 244-45 (5th Cir. 1962), *cert. denied*, 372 U.S. 929 (1963); *Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874, 886-87 (1st Cir. 1966). Those complaints need not be reweighed by this Court, for respondent's determined search for error requires reading of the record "with a microscopic eye"—a procedure contrary to settled principles of appellate review of jury awards. See *Flintkote Co.* v. *Lysfjord,* 246 F.2d 368, 393-94 (9th Cir. 1957), *cert. denied,* 355 U.S. 835 (1957).

B. The Branded Dealers

(1) We submit that the short answer to Standard's issues regarding the Branded Dealers is that the court of appeals resolved those issues against respondent. Thus, the court observed (A. 107):

> "The Branded Dealers purchased gasoline and oil from Standard which they in turn sold at retail. With respect to them, Perkins' story is quickly told. Because of Standard's favoritism and discrimination they were able to and did offer lower prices and better services and facilities than Perkins in marketing at retail."

While that quotation is not unambiguous, when read in the context in which it appears in the court's opinion it

must be either a repetition of Perkins' contentions—which the court stated in detail in the immediately preceding paragraph (see A. 106-07 and fn. 3)—or a holding in favor of Perkins. The latter construction is the more reasonable one, since the court's holding as to Signal-Regal begins in the paragraph immediately following the quoted language (see A. 107-08). Later in its opinion, after some unrelated holdings, the court of appeals expressly ruled that "[n]either did the [district] court err in submitting to the jury Perkins' claims based upon Standard's 2(d) and 2(e) violations" (A. 111). The court's statement that Perkins could recover such damages only to the extent he operated as a retailer (A. 111-12) was no more than a "cautionary observation" directed toward the new trial, as the court pointed out in its opinion on rehearing (A. 103). That statement in no wise detracted from the plain ruling quoted above.[16]

(2) In any event, none of Standard's substantive allegations of error regarding the Branded Dealers is well taken. First, the trial judge charged the jury

[16] The only Section 2(d) and 2(e) issues in the case involve the Branded Dealers (A. 47, 106-07; P. Br. 22, 31-32). While the record contains evidence that the Regal stations, which obtained Standard gasoline through Signal's distributive chain, advertised that they sold major brand gasoline and honored the majors' credit cards, the trial judge charged the jury in the course of his instructions on damages to disregard that testimony as irrelevant (A. 70). While Standard assails petitioner's reference in his statement of facts to that testimony about "price-related" benefits to Signal-Regal (see R. Br. 6, 14-15 fn. 13), petitioner nowhere argues that Standard violated Section 2(d) or 2(e) in its dealings with Signal. Moreover, the fact that Regal advertised major brand gasoline and acceptance of major credit cards was before the jury in photographs of the Regal stations (see Ex. 106C, A. 559), which Standard itself cites as evidence of Regal's "well-advertised" stations (R. Br. 12).

that in order for Perkins to recover for price discriminations in favor of the Branded Dealers the jury must first find that those Dealers paid Standard a "final net price which was *in fact lower* than the final net price computed in like fashion which defendant Standard charged plaintiff, Clyde Perkins . . ." (A. 58, emphasis added).[16] Continuing, the judge said that (A. 59)—

> "*as a matter of law that there is not discrimination in price if the price charged by Standard to two purchasers are identical* even though in one case the price has been firmly agreed upon in the contract while in the other the contract price was higher but was reduced by a contemporaneous or later adjustment, such as a temporary allowance. In other words, a purchaser receiving the same price as other purchasers cannot complain merely because he has no contractual assurance that the cut price will continue in the future for any definite period of time while in the case of other purchasers such contractual assurance exist." [Emphasis added.]

The judge's charge on this point was, if anything, more detailed and favorable to Standard than its requested instruction that "[a] discrimination in price would occur only if, after taking into account price assistance payments to dealers, the net price to such dealers was lower than the net amount paid over to Standard for the same products by Clyde Perkins, or Perkins Oil Company of Oregon and Perkins Oil Company of Washington" (A. 86). In these circumstances it is difficult to understand Standard's complaint that the

[16] The judge also instructed the jury that in determining the applicable final net prices it must take "into account all discounts, rebates, allowances, adjustments, and taxes if any there be which were a part of the terms of the sale or later allowed and granted at any time within the claim period" (A. 58).

judge's charge "permitted the jury to award damages to Perkins because of Standard's price assistance policy, even though the prices to dealers were higher than those paid by Perkins" (R. Br. 46).

Secondly, Standard admits its own evidence establishes that five Branded Dealers paid a lower price than Perkins during the claim period (R. Br. 6 fn. 3, 13 and fn. 11). While Standard finds these discriminatorily lower prices to be "inconsequential" and "immaterial," there is no question that the jury could have found them to be unlawful.[17]

Beyond this, the record contains substantial evidence from which the jury could have found that Standard's admitted price discriminations did not tell the whole story. Thus, an operator of a Branded Dealer station in Roseburg testified that he had received price assistance from Standard of approximately 7 cents per gallon (A. 247)[18]—an amount higher than any listed

[17] The evidence of Standard's 2(d) and 2(e) violations is also set forth in its brief but characterized as *de minimis.* "Standard's branded dealers made sales on Standard's credit cards and could earn an allowance of one-quarter cent per gallon for maintaining clean restrooms" (R. Br. 14, fn. omitted). Standard also acknowledges the record evidence that it painted one dealer's station and granted him advertising allowances (R. Br. 15 fn. 13). Here again, the violation is clear, and the jury certainly was not bound to accept Standard's denigration of the uncontroverted evidence. See, in this regard, P. Br. 15.

[18] Standard argues that this dealer admitted, on cross examination, that "he could be wrong" in his testimony summarized above (R. Br. 14 fn. 12). The dealer in fact testified that "[i]t is possible anyone could be incorrect" (Tr. 641). When shown a document which Standard's counsel purported to prove him wrong, he said that "[i]t doesn't make me believe it yet" (Tr. 640) and: "I could be wrong. I could be wrong. This sheet could be wrong. I see nothing here to say that this is the God's fact; there is nothing here, there is no sale on this paper."

on Standard's Roseburg exhibits (see Ex. 1523 H-J, P-Q, A. 612-14, 619-20). A distributor to Standard's Branded Dealers in Centralia also testified that, "[a]t any time there was a price disturbance," he allowed his retailers discounts of 4½ cents per gallon (Tr. 560) —an amount which appears infrequently on Standard's Centralia exhibits (see Ex. 1523 L-M, X-CC, A. 616-18, 625-30).

In addition, the key to Standard's contention that its price assistance program never amounted to actionable discrimination is its assertion that Perkins' price to Standard was figured on the posted tank truck price (the price to retail dealers) less a 4 to 5½ cent per gallon discount, while Standard's price to its Dealers was generally the tank truck price itself (R. Br. 45-46). The fallacy in Standard's syllogism is its failure to point out that during periods of depressed retail prices the Branded Dealers received price assistance based *on the difference between the retail price and the posted price,* not the posted price alone—with the price assistance to the Dealers increasing as the retail price dropped (see A. 214, 218). Moreover, Standard's price adjustment sheet, which sets forth its adjustment formula, makes clear that whenever the posted price was higher than the retail price, the Branded Dealers would get a greater discount than Perkins on regular gasoline, necessarily lowering their price below his (Ex. 93M, 343B, A. 547, 577). During the claim period the posted price from time to time dropped below tank wagon (A. 234; Tr. 630), with retail prices falling considerably lower than any of the prices stated on Standard's exhibits (Tr. 583, 630-32; Ex. 1523 A-CC, A. 605-30).

Standard's remaining complaints as to the Branded Dealers deal with damages. On that issue the judge charged the jury, in part, as follows (A. 67):

> "I should instruct you that as a matter of law you *cannot* compute damages by merely *taking the difference between the price alleged to have been paid by Clyde Perkins* or by the two Perkins corporations or any of them for gasoline to Standard and the price charged the most favored purchaser from Standard *and by then multiplying the number of gallons* which Standard supplied to them by this difference.
>
> "The law allows you coverage only for damages actually sustained by reason of the violation of the Act, and therefore the mechanical price difference as such in and of itself is not the proper measure of damage from the facts in this case." [Emphasis added.]

Here again, it is difficult to perceive the basis for Standard's assertion that the "trial court's instructions permitted the jury to award damages under Sections 2(d) and 2(e) measured by Perkins' entire wholesale gallonage" (R. Br. 47). As the above quotation makes plain, the judge's charge expressly precluded any such recovery. While the judge correctly permitted the jury to take into account the "amount of the price differential" in assessing damages (A. 66), he precluded the jury from multiplying that amount by Perkins' entire gallonage (A. 67).[19]

Finally, Standard asserts that it cannot be held responsible for trade diverted from Perkins to retail outlets operated by others than the Branded Dealers

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[19] Thus, the trial judge in effect instructed the jury not to base any damages on the computations in Ex. 82 B, A. 528, rendering superfluous Standard's objections thereto (see R. Br. 48-49).

(See R. Br. 48, 51 fn. 60). That clearly is not the law. Where, as here, causation is established (see *supra*, pp. 8-15), the proper measure of damages is "how much worse off [Perkins] is because others have paid less" (*ICC* v. *United States*, 289 U.S. 385, 390 (1933)), not how much better off the favored purchasers are. Surely Perkins' recovery for damages sustained during deep price wars caused by Standard should not be limited because the favored purchasers might not have profited as much during those wars as they (and Standard) would have liked (see A. 65).[20]

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[20] In the same vein, Standard argues that no damages can properly be assessed against it for petitioner's losses in the Centralia area prior to the fall of 1956 when the Regal price wars spread throughout the Pacific Northwest (see R. Br. 51). This argument is premised on an assertion that "[t]here was no evidence that Signal sold gasoline to anyone in Centralia, directly or indirectly" (R. Br. 19 and fns. 19, 20, 21). That assertion and the conclusions based thereon are contrary to the record evidence. Signal sold Standard gasoline to one B. F. Harris who resold to two of Perkins' large retail accounts in the Centralia area (the town of Centralia and the surrounding area). After Harris began supplying those accounts, Perkins lost their patronage. Signal's price to Harris was considerably below the price at which Perkins could sell to his former accounts, because Signal provided Harris with "big" price adjustments—one of which amounted to over $40,000. (A. 157, 362-65, 382-83; Tr. 256, 267, 1055, 1059-60, 1065-69, 1348, 1681-82, 1688-89, 2920-21, 3081-84, 3390-95; Ex. 284A, 284B, A. 563, 565.) The fact that Harris subsequently lost one of those accounts to another supplier (R. Br. 19 fn. 20) does not detract from the fact that Perkins lost it to Harris (Tr. 3455).

The level of Standard's discourse about the Centralia area (and the record in general) is fairly reflected in its statement that "[p]etitioner says Signal entered the Centralia market as a wholesaler (Pet. Br. 14), but the cited record references do not support that assertion," listing Tr. 2988, *3080-81* (R. Br. 19 fn. 19). Petitioner in fact cited, *inter alia*, Tr. 2988 and *3081-84* (P. Br. 14), with the critical point appearing at Tr. *3083* (Perkins' former customer in Centralia had in his possession invoices bearing "the printed heading of Signal Oil and Gas," which were attached to Harris' invoices).

C. Standard's Meeting Competition Argument

In reviewing the facts underlying Standard's alleged Section 2(b) defense (R. Br. 8-10, 53-54), it is important to stress what Standard omits: that to the extent Union Oil Company made any gasoline sales to Signal during the entire claim period, not one drop was sold in the Pacific Northwest (A. 444; Tr. 5703-04; Ex. 1703, A. 649);[21] that the asserted offer by Union in 1956, upon which Standard relies (R. Br. 53), pertained only to California (A. 428; Ex. 1705, A. 651); and that most of the excluded exhibits mentioned by Standard (R. Br. 53) specifically refer only to California, and none mentions the Pacific Northwest. Finally, Standard relies in part on offers to Signal by Westway (Ex. 1705, A. 651), a wholly owned subsidiary of Union Oil (A. 263), in asserting that respondent was meeting competition. But Westway sold Union's house brand gasoline, which was of lower quality and had a lower octane value (Tr. 881). Standard had no Section 2(b) defense, and the jury properly rejected its argument. See also, P. Br. 66-68.

The jury verdict in favor of Perkins was rendered more than five years ago (A. 5), and Standard's discriminations occurred between 12 and 14 years ago. The opinion of the court of appeals was entered almost two and one-half years after oral argument, and disposition of the petition for rehearing took another five months (A. 7). The orderly administration of justice requires that the important questions raised by petitioner be resolved by this Court at this time.

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[21] The only sales Union made to Signal in 1956 were in Phoenix, Arizona; it made no sales to Signal in California prior to September 1957 (Ex. 1703, A. 649).

CONCLUSION

The judgment of the Ninth Circuit should be reversed. The judgment of the district court should be affirmed, and the award to petitioner of $1,298,213.71 in damages and attorney's fees should be reinstated.

Respectfully submitted,

EARL W. KINTNER
GEORGE R. KUCIK
STEPHEN S. MAYNE
THOMAS L. SIEGEL
1815 H Street, N. W.
Washington, D. C. 20006

ROGER TILBURY
1110 Standard Plaza
Portland, Oregon 97204

ERNEST BONYHADI
BRUCE M. HALL
1400 Public Service Building
Portland, Oregon 97204

Counsel for Petitioner

Of Counsel:

ABENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N. W.
Washington, D. C. 20006

RIVES & SCHWAB
1400 Public Service Building
Portland, Oregon 97204

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APPENDIX*

EXHIBIT NUMBER	OFFERED	RECEIVED IN EVIDENCE
1458D	5618	5619
1523A-J	4542	4543
1523K, L, M	4542	4542
1523N-CC	4545	4546
1550B	5493	5496
1550B-1	5493	5496
1550C-1	4321	4361
1703	5217	5217
1705	5475	5475
1711	5526	5526

* This Appendix does not list those exhibits which also were cited in petitioner's main brief.